UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMA Docket No. M-1131-1
	)	
Unified Western Grocers, Inc.;	)	
Dean Foods Company of	)	
California, Inc.;	)	
Safeway, Inc.; and Swiss Dairy,	)	
	)	
Petitioners	)	
	)	
and	)	
	)	
Dairy Institute of California,	)	
	)	
Interested Party to Which	)	
No Relief Can Be Granted	)	**Decision and Order**

PROCEDURAL HISTORY

Unified Western Grocers, Inc.; Dean Foods Company of California, Inc.; Safeway, Inc.; and Swiss Dairy [hereinafter Petitioners] and Dairy Institute of California instituted this proceeding by filing a "Petition for Declaratory Relief, Restitution, Permanent Injunction" [hereinafter Petition] on August 24, 2001. Petitioners and Dairy Institute of California instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal order regulating the handling of milk in the Arizona-Las Vegas Marketing Area (7 C.F.R. pt. 1131) [hereinafter the

Arizona-Las Vegas Milk Marketing Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

Petitioners and Dairy Institute of California seek: (1) a declaration that compensatory payments imposed on California handlers that shipped milk and milk products into Clark County, Nevada, since October 1, 1999, violate section 8c(5)(A) and (G) of the AMAA (7 U.S.C. § 608c(5)(A), (G)) and the Fifth Amendment to the Constitution of the United States; (2) a declaration that California handlers that ship milk into Clark County, Nevada, are exempt from complying with the pricing provisions of any federal milk marketing order; (3) a refund, with interest, of compensatory payments made by Petitioners for milk shipped into Clark County, Nevada, since October 1, 1999; and (4) a permanent injunction prohibiting the enforcement of the Arizona-Las Vegas Milk Marketing Order against California handlers who ship milk into Clark County, Nevada (Pet. at 14-15).

On October 18, 2001, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent],[1] filed "Respondent's

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[1]Petitioners and Dairy Institute of California instituted this proceeding against Ann M. Veneman, in her capacity as Secretary of Agriculture, and James R. Daugherty, in his capacity as Market Administrator for the Arizona-Las Vegas Milk Marketing Order, who Petitioners and Dairy Institute of California refer to as "Respondents." However, this proceeding is an "in re" proceeding which does not formally include adverse parties. Black's Law Dictionary 796 (7th ed. 1999). Instead, this proceeding involves the matter of Petitioners' and Dairy Institute of California's rights and duties

(continued...)

Answer": (1) denying the material allegations in the Petition; (2) stating the Petition fails to state a claim upon which relief can be granted; and (3) stating there is no jurisdiction regarding allegations by Dairy Institute of California.

On February 5 and 6, 2002, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing in Sacramento, California. Thomas S. Knox and Glen C. Hansen, Knox, Lemmon & Anapolsky, LLP, Sacramento, California, represented Petitioners and Dairy Institute of California. Gregory Cooper, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.[2]

On May 2, 2002, Petitioners and Dairy Institute of California filed "Petitioners' Opening Brief." On May 30, 2002, Respondent filed "Respondent's Proposed Findings of Fact, Conclusions of Law, and Brief in Support Thereof" [hereinafter Respondent's

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[1](...continued)
under the AMAA and the Arizona-Las Vegas Milk Marketing Order. The Administrator, Agricultural Marketing Service, United States Department of Agriculture, is the United States Department of Agriculture official responsible for responding to the Petition; hence, the Administrator, Agricultural Marketing Service, United States Department of Agriculture, is the Respondent in this proceeding. See section 900.52a of the Rules of Practice (7 C.F.R. § 900.52a).

[2]On May 20, 2002, Garrett B. Stevens, Office of the General Counsel, United States Department of Agriculture, Washington, DC, replaced Gregory Cooper as counsel for Respondent (Substitution of Respondent's Counsel). On February 11, 2003, Nazima H. Razick, Office of the General Counsel, United States Department of Agriculture, Washington, DC, entered an appearance as co-counsel on behalf of Respondent (Notice of Appearance).

Brief]. On June 19, 2002, Petitioners and Dairy Institute of California filed "Petitioner's [sic] Reply Brief."

On December 12, 2002, the ALJ issued a "Decision" [hereinafter Initial Decision and Order] in which the ALJ denied the Petition (Initial Decision and Order at 15).

On January 27, 2003, Petitioners and Dairy Institute of California filed "Petitioners' Appeal to the Judicial Officer; Brief in Support Thereof" [hereinafter Petitioners' and Dairy Institute of California's Appeal Petition]. On March 7, 2003, Respondent filed "Respondent's Memorandum in Opposition to Petitioners' Appeal Petition to the Judicial Officer, and Respondent's Cross-Appeal" [hereinafter Respondent's Appeal Petition]. On March 27, 2003, Petitioners and Dairy Institute of California filed "Petitioners' Brief in Opposition to Respondents' [sic] Cross-Appeal." On April 2, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based on a careful consideration of the record, I agree with the ALJ's denial of the Petition. Therefore, with minor modifications, I adopt the ALJ's Initial Decision and Order as the final Decision and Order.

Petitioners' and Dairy Institute of California's exhibits are designated by "PX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER I—DECLARATION OF CONDITIONS AND POLICY

. . . .

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

. . . .

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

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SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating handling of commodity

. . . .

(5) Milk and its products; terms and conditions of orders

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. . . .

. . . .

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

. . . .

(11) Regional application

. . . .

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

The price of milk paid by a handler at a plant operating in Clark County, Nevada shall not be subject to any order issued under this section.

. . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A)(i) Except as provided in clause (ii), the Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared

policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(ii) The Secretary may not terminate any order issued under this section for a commodity for which there is no Federal program established to support the price of such commodity unless the Secretary gives notice of, and a statement of the reasons relied upon by the Secretary for, the proposed termination of such order to the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives not later than 60 days before the date such order will be terminated.

7 U.S.C. §§ 602(4), 608c(5)(A), (G), (11)(C), (15), (16)(A).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER X—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MILK) DEPARTMENT OF AGRICULTURE

. . . .

PART 1000—GENERAL PROVISIONS OF FEDERAL MILK MARKETING ORDERS

. . . .

Subpart D—Rules Governing Order Provisions

§ 1000.26 Continuity and separability of provisions.

. . . .

(b) *Suspension or termination*. The Secretary shall suspend or terminate any or all of the provisions of the order whenever he/she finds that such provision(s) obstructs or does not tend to effectuate the declared policy of the Act. The order shall terminate whenever the provisions of the Act authorizing it cease to be in effect.

7 C.F.R. § 1000.26(b).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

Decision Summary

Even though Congress exempted Anderson Dairy, the sole handler operating a plant in Clark County, Nevada, from the pricing requirements of Arizona-Las Vegas Milk Marketing Order,[3] the decision not to likewise exempt Petitioners on packaged fluid milk shipped from their California plants into Clark County, Nevada, during each month of the years 2000 and 2001, was in accordance with law.

Realignment of the Parties

Dairy Institute of California is not a handler; it is a trade association. Dairy Institute of California cannot be granted relief under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). Nevertheless, Dairy Institute of California is not dismissed; instead, the parties are realigned to separate Dairy Institute of California from the four Petitioners to which relief could be granted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).[4] Dismissal of a trade association might be more appropriate in another case, and realignment of the parties in this proceeding should not be regarded as precedent. Dairy Institute of California seeks the identical outcome for Petitioners that

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[3]7 U.S.C. § 608c(11)(C).

[4]See the ALJ's "Order Amending Case Caption" filed December 12, 2002.

Petitioners seek for themselves and Dairy Institute of California has contributed to the very capable, professional presentation in support of the Petition.

Issue

Did the Market Administrator for the Arizona-Las Vegas Milk Marketing Order [hereinafter the Market Administrator] unlawfully deny Petitioners, on packaged fluid milk shipped from their California plants into Clark County, Nevada, an exemption from the Arizona-Las Vegas Milk Marketing Order's requirement to make payments to the producer-settlement fund and the administrative fund for each month of the years 2000 and 2001?

Findings of Fact

1. Effective January 1, 2000, Clark County, Nevada, was included in the Arizona-Las Vegas Milk Marketing Order (7 C.F.R. § 1131.2; 64 Fed. Reg. 70,867 (Dec. 17, 1999); Tr. 121-22).

2. Petitioners' plants are located in Los Angeles County, California, Orange County, California, and Riverside County, California (Tr. 9, 34).

3. Under the Arizona-Las Vegas Milk Marketing Order, each Petitioner is a partially regulated distributing plant that is subject to marketwide pooling of producer returns under the California Department of Food and Agriculture's milk classification and pricing program (7 C.F.R. § 1000.76; Tr. 27).

4. Each Petitioner is required to make payments to the Arizona-Las Vegas Milk Marketing Order producer-settlement fund (also called compensatory payments) on

packaged fluid milk shipped into Clark County, Nevada, during only those months in which the California Department of Food and Agriculture's Class 1 price at the Petitioner's plant location is lower than the federal milk marketing order Class I price at that same location (7 C.F.R. § 1000.76(c); Tr. 27, 29-30, 35-36).[5]

5. In months when the California Department of Food and Agriculture's Class 1 price at a Petitioner's plant location is higher than the federal milk marketing order Class I price at that same location, that Petitioner is not required to make payments to the producer-settlement fund.

6. The administrative fund monthly payments are calculated at $0.025 per hundredweight of milk.

7. During 2000 and 2001, Unified Western Grocers, Inc., located in Los Angeles County, California, paid the Market Administrator $19,087.85 for milk shipped into Clark County, Nevada. Unified Western Grocers, Inc.'s payments were comprised of $17,079.43 paid into the producer-settlement fund and $2,008.42 paid into the administrative fund. (PX 13; Tr. 109-13.)

8. During 2000 and 2001, Dean Foods Company of California, Inc., located in Orange County, California, paid the Market Administrator $192,842.36[6] for milk shipped

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[5]Federal milk marketing orders use the Roman numeral "I" when referring to Class I milk. The California Department of Food and Agriculture's classification system uses the Arabic numeral "1" when referring to Class 1 milk.

[6]The total is 2 cents less than that shown on PX 12 because of one penny

(continued...)

into Clark County, Nevada. Dean Foods Company of California, Inc.'s payments were comprised of $172,083.13 paid into the producer-settlement fund and $20,759.23 paid into the administrative fund. (PX 12; Tr. 89-93.)

9. During 2000 and 2001, Safeway, Inc., located in Los Angeles County, California, paid the Market Administrator $106,303.22 for milk shipped into Clark County, Nevada. Safeway, Inc.'s payments were comprised of $96,039.22 paid into the producer-settlement fund and $10,264 paid into the administrative fund. (PX 16; Tr. 156-61.)

10. During 2000 and 2001, Swiss Dairy, located in Riverside County, California, paid the Market Administrator $51,126.14 for milk shipped into Clark County, Nevada. Swiss Dairy's payments were comprised of $44,633.73 paid into the producer-settlement fund and $6,492.41 paid into the administrative fund. (PX 9; Tr. 79-83.)

11. Making payments to the Arizona-Las Vegas Milk Marketing Order producer-settlement fund and administrative fund impacts each Petitioner's cost of purveying fluid milk to retail markets.

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[6](...continued)
discrepancy in the February 2000 total and one penny discrepancy in the October 2001 total.

12. There are many variables in the cost of purveying fluid milk to retail markets, some of which are taken into account in federal milk marketing orders and some of which are not.

13. During 2000 and 2001, Anderson Dairy, the sole handler operating a plant in Clark County, Nevada, was exempt from the pricing requirements of the Arizona-Las Vegas Milk Marketing Order, including the requirement to make payments to the producer-settlement fund and the administrative fund, due to an Act of Congress (7 U.S.C. § 608c(11)(C); Tr. 38-41).

14. Anderson Dairy, the sole handler operating a plant in Clark County, Nevada, during 2000 and 2001, was, instead, regulated by the Nevada State Dairy Commission, as were handlers operating in some other parts of Nevada (Tr. 41).

15. Each Petitioner is in competition with Anderson Dairy in Clark County, Nevada, by virtue of selling in the same marketing area, although the extent to which that competition impacts any Petitioner is unclear (Tr. 144-45).

16. The Market Administrator's decision not to exempt Petitioners from the requirement to make payments to the producer-settlement fund and the administrative fund on milk shipped into Clark County, Nevada, was reasonable and rational and applied uniformly and consistently.

Discussion

Dr. William Schiek, an expert economist in milk marketing employed by Dairy Institute of California, testified that the minimum price Anderson Dairy is required to pay, set by the Nevada State Dairy Commission, is typically lower than the minimum price Petitioners are required to pay. In Dr. Schiek's opinion, that situation creates an unequal burden on Petitioners and constitutes an economic barrier to Petitioners' shipment of Class I milk into Clark County, Nevada. (PX 1-PX 6; Tr. 41-50.)

Dr. Schiek acknowledged on cross-examination that his information about the "actual" price Anderson Dairy paid was based solely on the Nevada State Dairy Commission's minimum price requirement; that he had no knowledge whether Anderson Dairy paid higher than the minimum price, for example, paying an over-order premium (Tr. 60-61).

On cross-examination, Dr. Schiek acknowledged that, since January 2000, the payment obligations of partially regulated plants, such as those of Petitioners, are the same in all 11 federal milk marketing orders, not just the Arizona-Las Vegas Milk Marketing Order. Further, Dr. Schiek acknowledged there was a similar compensatory payment requirement under the prior federal milk marketing order that included Clark County, Nevada.[7] Dr. Schiek also acknowledged that he understood the need to protect the integrity of milk marketing orders by having a provision for compensatory payments.

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[7]See the federal milk marketing order regulating the handling of milk in the Great Basin Marketing Area (7 C.F.R. pt. 1139 (1999)).

(Tr. 52-59.) Dr. Schiek expanded his explanation on re-direct examination, saying that the purpose of the entire compensatory payment system "is to essentially protect the ability of the federal government to maintain the market order and the way that would chiefly be undermined is if somebody with a -- could come in and undercut competitors who are subject to federal order rules by bringing milk in at a much, much lower cost or a lower price and disrupt competition in the marketplace." (Tr. 67.)

Dr. Schiek explained, given that Anderson Dairy is not required to pay the federal milk marketing order Class I price, there is an unequal playing field, and since the United States Department of Agriculture cannot regulate Anderson Dairy, the United States Department of Agriculture should not compel others to play on that field according to United States Department of Agriculture rules (Tr. 59).

Dr. Schiek explained on redirect examination that, on a level playing field, all handlers who are competing for Class I sales in the milk marketing area are subject to the same Class I pricing rules. Since Anderson Dairy is exempt from the pricing provisions, the United States Department of Agriculture has no mechanism to enforce the pricing provisions on all the competitors who sell milk in Clark County, Nevada. Consequently, Dr. Schiek did not believe that enforcement of the compensatory payment system for shipments into Clark County, Nevada, from outside the marketing area served to level the playing field. (Tr. 67-68.)

Mr. William Alan Wise, an experienced milk market administrator who is expert in the field of milk marketing regulation, testified that the main purpose of milk marketing

orders is to provide a framework for orderly marketing of milk products, principally through classified pricing and marketwide pooling. Classified pricing is pricing milk based on its ultimate use with different values for different uses. Normally, Class I milk, which is the subject of this proceeding, is higher-valued because it is fluid, more highly perishable. Mr. Wise explained that a partially regulated distributing plant (such as each of Petitioners' plants) is a plant with packaged fluid milk sales in the milk marketing area but not to an extent that it meets the qualifications to be fully regulated. (Tr. 122-23, 127-28.)

Mr. Wise was asked to explain the purpose of compensatory payments, such as Petitioners have paid. Mr. Wise testified, without compensatory payments, if inexpensive milk were sold in the milk marketing area, those sales would tend to reduce sales by fully regulated handlers, which would diminish the total value of the pool (producer-settlement fund), thereby reducing returns to producers (dairy farmers). He added, also, "it's a competitive equity issue with other fully regulated handlers." (Tr. 128.) Compensatory payments may be required whether or not the partially regulated distributing plant is in an area with a classified pricing and marketwide pooling milk classification system. Payments by a handler operating a partially regulated distributing plant are treated uniformly under every federal milk marketing order. (7 C.F.R. § 1000.76; Tr. 128-30.)

Mr. Wise explained that Arizona handlers, including three Maricopa County, Arizona, handlers, Safeway, Kroger, and Shamrock, which are in the same marketing area as Clark County, Nevada, and are also regulated under the Arizona-Las Vegas Milk

Marketing Order, ship milk into Clark County, Nevada. Also, handlers with plants located in Salt Lake City, Utah, which is in the Western Milk Marketing Area,[8] ship milk into Clark County, Nevada. These federal milk marketing order handlers pay the Class I price applicable at their plants regardless of where they sell their milk. The federal price at Maricopa County, Arizona, is higher than the federal price at Riverside County, California, and Los Angeles County, California. Thus, there would be potential economic disadvantage to the Maricopa County, Arizona, and Salt Lake City, Utah, handlers if Petitioners were somehow not required to pay compensatory payments when owed. (Tr. 131-32, 142-43.)

On cross-examination, Mr. Wise acknowledged that Petitioners face a unique situation in Clark County, Nevada, where a handler within a federal milk marketing area has been exempted from the pricing requirements of that federal milk marketing order. This exempt handler, Anderson Dairy, can be compared to handlers in milk marketing areas unregulated by a federal milk marketing order. (Tr. 138.) Anderson Dairy is regulated by the Nevada State Dairy Commission.

The Secretary of Agriculture is charged with implementing congressional policy to establish and maintain orderly marketing conditions for milk providing producers (dairy farmers) and consumers an orderly flow of milk to market, while avoiding unreasonable fluctuations in supplies and prices (7 U.S.C. § 602(4); Tr. 122-24). In order to implement

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[8]See 7 C.F.R. pt. 1135.

congressional policy, the Secretary of Agriculture has established federal milk marketing orders which include pricing, payment, and pooling requirements. Compensatory payments help protect the integrity of the federal regulatory scheme. (Tr. 137-38.)

The Secretary of Agriculture cannot ensure a "level playing field" among competing handlers. There are too many constantly fluctuating variables, many of which are beyond the Secretary of Agriculture's control. Examples mentioned by Mr. Wise and Dr. Schiek that impact Petitioners and their competitors in Clark County, Nevada, include the minimum prices established by the California Department of Food and Agriculture, the minimum prices established by the Nevada State Dairy Commission, and whether an over-order premium must be paid to obtain milk. California has a statewide pool; Nevada does not. Freight costs vary considerably, and there may be back haul issues and issues of other products being shipped with the packaged fluid milk. Fuel and other energy costs that must be met to keep packaged fluid milk fresh and to transport it are variable, and the peculiar circumstances of statewide and local marketing areas, including the Act of Congress that exempted Anderson Dairy from the pricing requirements of the Arizona-Las Vegas Milk Marketing Order -- these myriad factors all affect the costs of purveying fluid milk to retail markets.

Pricing differentials are sometimes unfavorable to Petitioners but are sometimes favorable (7 C.F.R. § 1000.52). In months when the California Department of Food and Agriculture's Class 1 price at a Petitioner's plant location is higher than the federal milk marketing order Class I price at that same location, that Petitioner pays no compensatory

payments. Federal milk marketing order prices vary by location. As shown by Respondent's Brief, Petitioners benefit when they ship their packaged fluid milk into Arizona, because the federal milk marketing order price at Phoenix, Arizona, under the 1A pricing is $.25 higher than the federal milk marketing order price at Los Angeles County, California, and $.35 higher than the federal milk marketing order price at Riverside County, California. Hence, Petitioners can make the required compensatory payments and still have a price advantage over the competing federal milk marketing order handlers in Phoenix, Arizona. (7 C.F.R. § 1000.52; Tr. 131-32; Respondent's Brief at 12-13.) Respondent argues this price advantage, even during months that Petitioners are required to make compensatory payments, demonstrates that the compensatory payment provisions are not the cause of Petitioners' complaints, but rather, the federal milk marketing order prices under option 1A for pricing Class I milk at various locations (*i.e.*, Las Vegas, Nevada, as compared to Los Angeles County, California, or Riverside County, California) ordered by Congress are the cause of Petitioners' complaints (7 U.S.C. § 7253(c) note; Respondent's Brief at 5-7).

The Secretary of Agriculture has not chosen to match the congressionally established exemption for a handler located at a plant in Clark County, Nevada, by extending a similar exemption to handlers whose plants are located elsewhere and who ship milk into Clark County, Nevada. The Secretary of Agriculture has chosen instead to apply the regulatory scheme uniformly, without exception beyond one mandate by Congress (7 U.S.C. § 608c(11)(C)). I find the Secretary of Agriculture's choice

reasonable. The Arizona-Las Vegas Milk Marketing Order provides no exemption for handlers who ship milk into Clark County, Nevada, just as it provides no exemption for handlers who ship milk into any other part of the area covered by the Arizona-Las Vegas Milk Marketing Order.

Conclusions of Law

1. Petitioners have the burden of proof in any proceeding instituted pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). Petitioners have failed to meet the burden of proof in this proceeding.

2. The Secretary of Agriculture is charged with implementing congressional policy to establish and maintain orderly marketing conditions for milk providing producers (dairy farmers) and consumers an orderly flow of milk to market, while avoiding unreasonable fluctuations in supplies and prices (7 U.S.C. § 602(4); Tr. 122-24).

3. Payments by handlers operating partially regulated distributing plants are treated uniformly under every federal milk marketing order (7 C.F.R. § 1000.76; Tr. 130).

4. There are many constantly fluctuating variables affecting the costs of purveying fluid milk to retail markets. The Secretary of Agriculture has discretionary authority to choose inaction on any variable, and inaction is entirely reasonable when presented with Anderson Dairy's exemption by Act of Congress.

5. The Secretary of Agriculture is required neither by section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)) nor by section 8c(16)(A) of the AMAA (7 U.S.C. § 608c(16)(A)) to grant the relief requested by Petitioners.

6. The Market Administrator's decision not to exempt Petitioners from the requirement that they make payments to the producer-settlement fund (also called compensatory payments) on fluid milk shipped into Clark County, Nevada, was in accordance with law, had a rational basis, promoted uniform application of milk marketing order pricing requirements, was applied consistently, was reasonable, was neither arbitrary nor capricious, and is entitled to deference.

7. The Market Administrator's decision not to exempt Petitioners from the requirement that they make payments to the administrative fund on fluid milk shipped into Clark County, Nevada, was in accordance with law, had a rational basis, promoted uniform application of milk marketing order pricing requirements, was applied consistently, was reasonable, was neither arbitrary nor capricious, and is entitled to deference.

8. Petitioners' producer-settlement fund payments and administrative fund payments may be refunded only when collection of the payments is not in accordance with law.

9. The collection of producer-settlement fund payments and administrative fund payments from Petitioners was in accordance with law; thus, Petitioners' request for refund of producer-settlement fund payments and administrative fund payments, and for interest on those payments, must be denied.

10. The collection of producer-settlement fund payments and administrative fund payments from Petitioners was in accordance with law; thus, Petitioners' request for declaratory and injunctive relief must be denied.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioners' and Dairy Institute of California's Appeal Petition

Petitioners and Dairy Institute of California raise five issues in their appeal petition. First, Petitioners and Dairy Institute of California contend the ALJ erroneously concluded Respondent did not violate section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)). Petitioners and Dairy Institute of California assert the requirement that Petitioners make payments to the Arizona-Las Vegas Milk Marketing Order producer-settlement and administrative funds, while one local handler is exempt from making such payments, creates a trade barrier prohibited by section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)). (Petitioners' and Dairy Institute of California's Appeal Pet. at 4-5, 13-17.)

I find the ALJ correctly concluded Respondent did not violate section 8c(5)(G) the AMAA (7 U.S.C. § 608c(5)(G)). Section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)) provides that no marketing agreement or order applicable to milk or milk products in any marketing area shall prohibit or limit the marketing in that area of any milk or milk product produced in another area in the United States. Courts have held that section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)) is intended to prevent the Secretary of Agriculture from establishing trade barriers to the marketing in one area of

milk or milk products produced in another area.[9] The Secretary of Agriculture did not establish a trade barrier to the marketing of Petitioners' milk in the area covered by the Arizona-Las Vegas Milk Marketing Order. The Secretary of Agriculture applies the regulatory scheme embodied in the Arizona-Las Vegas Milk Marketing Order uniformly without exception beyond one congressional mandate for Anderson Dairy. The Arizona-Las Vegas Milk Marketing Order provides no exemption for handlers who ship milk into Clark County, Nevada, or any other part of the area covered by the Arizona-Las Vegas Milk Marketing Order. Rather, Congress provided that the price of milk paid by a handler at a plant operating within Clark County, Nevada, shall not be subject to any marketing order issued under section 8c of the AMAA (7 U.S.C. § 608c).[10]

Moreover, even if I were to find the requirement that Petitioners make payments to the Arizona-Las Vegas Milk Marketing Order producer-settlement and administrative funds, while one local handler is exempt from making such payments, is a trade barrier established by the Secretary of Agriculture (which I do not so find), I would conclude that section 8c(11)(C) of the AMAA (7 U.S.C. § 608c(11)(C)) constitutes an exception to the prohibition on the establishment of trade barriers.

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[9]*Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 379 (1964); *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76, 91-97 (1962); *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 19-20 (D.C. Cir. 1979); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 313 (3d Cir. 1968).

[10]7 U.S.C. § 608c(11)(C).

Further still, I find the purported unequal playing field was not created by the congressional exemption of Anderson Dairy in section 8c(11)(C) of the AMAA (7 U.S.C. § 608c(11)(C)). Instead, the unequal playing field was caused by the congressionally-mandated 1A pricing, which Petitioners and Dairy Institute of California do not challenge.

While Congress exempted Anderson Dairy from federal milk marketing order pricing requirements effective October 1, 1999, the actual federal milk marketing order reform provisions and the new federal milk marketing order prices did not become effective until January 2000, because of an injunction against the Secretary of Agriculture. During October, November, and December 1999, the extant 32 federal milk marketing orders and the extant federal milk marketing order prices remained in effect. (Tr. 121.) The extant federal milk marketing order price at Las Vegas, Nevada, was $.45 more than the extant federal milk marketing order price at Los Angeles County, California (PX 1 at cols. 2, 4).[11] Similarly, under the extant federal milk marketing order prices, the federal milk marketing order price at Las Vegas, Nevada, was $.35 more than the federal milk marketing order price at Riverside County, California (PX 3 at cols. 2, 4). Beginning January 1, 2000, when the new 1A pricing of the federal milk marketing order reform became effective, the federal milk marketing order price at Las Vegas, Nevada, was $.10 less than the federal milk marketing order price at Los Angeles County,

[11]While the total price may change each month, the difference in prices between these two locations never changes because the differentials are constant numbers (Tr. 23).

California, and the same as the federal milk marketing order price at Riverside County, California (PX 1 at cols. 2, 4, PX 3 at cols. 2, 4). Hence, the changes to pricing mandated by Congress created an immediate new $.55 price differential for a Los Angeles County, California, handler distributing milk into Clark County, Nevada, versus a federally- regulated handler operating a plant in Clark County, Nevada. Similarly, there was an immediate $.35 price differential for milk distributed in Clark County, Nevada, by handlers operating plants located in Riverside County, California (PX 3 at cols. 2, 4).

These price differentials for Petitioners had nothing to do with the congressional exemption of Anderson Dairy from federal milk marketing order pricing requirements in October 1999.[12] The price disadvantages would have occurred even if Anderson Dairy had remained fully regulated under the extant federal milk marketing order. Similarly, these price differentials had nothing to do with the compensatory payment provisions, which did not change between the extant federal milk marketing order that included Clark County, Nevada,[13] and those of the Arizona-Las Vegas Milk Marketing Order. In the 3 months prior to federal milk marketing order reform, the federal milk marketing order price at Los Angeles County, California, was significantly below the California Department of Food and Agriculture price at Los Angeles County, California (PX 1 at

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[12]7 U.S.C. § 608c(11)(C).

[13]See the federal milk marketing order regulating the handling of milk in the Great Basin Marketing Area (7 C.F.R. pt. 1139 (1999)).

cols. 3, 4); thus, virtually eliminating the possibility of imposed compensatory payments. The new congressionally-mandated federal milk marketing order 1A prices approximated the California Department of Food and Agriculture prices; thus increasing the likelihood of imposed compensatory payments on California handlers distributing milk in Clark County, Nevada (PX 1 at cols. 3, 4 (after January 1, 2000)). The same analysis holds true for Riverside County, California, handlers distributing milk in Clark County, Nevada (PX 3 at cols. 3, 4). Petitioners and Dairy Institute of California concede Congress mandated the new 1A pricing, which they do not challenge (Tr. 59-60) even though 1A pricing brings possibly-imposed compensatory payments. Hence, the compensatory payments, and a large portion of the price differentials, are caused by matters outside of the scope of this proceeding.

Second, Petitioners and Dairy Institute of California contend the ALJ applied section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)) erroneously when she analyzed whether the Secretary of Agriculture could ensure that all milk marketing costs were the same for all competing handlers in a specific market; but, then, erroneously concluded, since the Secretary of Agriculture cannot control all milk marketing cost variables, the Secretary of Agriculture is excused from eliminating trade barriers which violate section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)) (Petitioners' and Dairy Institute of California's Appeal Pet. at 5, 17-19).

The ALJ states the Secretary of Agriculture cannot ensure a level playing field among competing handlers because of constantly fluctuating factors beyond the Secretary

of Agriculture's control, that affect the cost of purveying milk to retail markets (Initial Decision and Order at 11-12). The ALJ states the Secretary of Agriculture may choose not to address the congressional exemption of Anderson Dairy from the pricing provisions of federal milk marketing orders, as follows:

Conclusions of Law

. . . .

> 5. There are many variables, in constant flux, that affect the costs of getting fluid milk onto retail shelves. The Secretary may, in her discretion, choose not to address with any action a variable such as Anderson Dairy's exemption by an Act of Congress, and it was reasonable for her to take no action.

Initial Decision and Order at 14.

However, the ALJ does not state, as Petitioners and Dairy Institute of California assert, that the Secretary of Agriculture's inability to control all factors affecting the cost of purveying milk to retail markets excuses the Secretary of Agriculture from eliminating trade barriers which violate section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)).

I agree with the ALJ that the Secretary of Agriculture cannot control all the factors which affect the cost of purveying fluid milk to retail markets. I also agree with Petitioners' and Dairy Institute of California's argument that the Secretary of Agriculture's inability to control all the factors that affect the cost of purveying fluid milk to retail markets does not somehow excuse the Secretary of Agriculture from eliminating trade barriers which violate section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)). However, for the reasons set forth in this Decision and Order, *supra*, I agree with the ALJ's conclusion that the Secretary of Agriculture's decision not to exempt Petitioners

from the Arizona-Las Vegas Milk Marketing Order does not violate section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)).

Third, Petitioners and Dairy Institute of California contend the ALJ erroneously held Respondent did not violate section 8c(16)(A) of the AMAA (7 U.S.C. § 608c(16)(A)). Petitioners and Dairy Institute of California contend, under section 8c(16)(A) of the AMAA (7 U.S.C. § 608c(16)(A)) and 7 C.F.R. § 1000.26(b), the Secretary of Agriculture has a mandatory duty to terminate or suspend provisions of federal milk marketing orders that obstruct the declared purposes of the AMAA. Petitioners and Dairy Institute of California contend the Arizona-Las Vegas Milk Marketing Order obstructs the purposes of the AMAA because it creates a trade barrier to the shipment of milk into Clark County, Nevada, from California, in violation of section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)). (Petitioners' and Dairy Institute of California's Appeal Pet. at 5, 19-21.)

As an initial matter, for the reasons set forth in this Decision and Order, *supra*, I conclude that the Arizona-Las Vegas Milk Marketing Order does not violate section 8c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)). Further, in October 1999, Congress specifically amended section 8c(11)(C) of the AMAA (7 U.S.C. § 608c(11)(C)) to provide that the price of milk paid by a handler at a plant operating in Clark County, Nevada, shall not be subject to any federal milk marketing order. At the time of this amendment, all federal milk marketing orders included producer-settlement fund provisions. Nevertheless, while Congress exempted Anderson Dairy from the pricing

provisions of federal milk marketing orders, Congress did not legislate any change or exception to the producer-settlement fund provisions in any federal milk marketing order. Congress' failure to legislate any change to federal milk marketing orders, while at the same time exempting Anderson Dairy from pricing provisions of federal milk marketing orders, establishes that producer-settlement fund provisions do not obstruct the declared purposes of the AMAA.

Moreover, the final rule for federal milk marketing order reform, which included producer-settlement fund provisions, was published on September 1, 1999, to be effective October 1, 1999 (64 Fed. Reg. 47,897-48,201). However, the United States District Court for the District of Columbia enjoined the implementation of the final rule. (Tr. 121.) Effective November 29, 1999, Congress enacted the Consolidated Appropriations Act[14] precluding any challenge to producer-settlement fund provisions in the final rule, other than on constitutional grounds, and requiring the final milk marketing order rule, as published in the Federal Register (with exceptions not relevant to this proceeding), to become effective and to be implemented by the Secretary of Agriculture beginning January 1, 2000.

The Consolidated Appropriations Act leaves the Secretary of Agriculture no discretion concerning the imposition of the producer-settlement requirement. The final rule includes Clark County, Nevada, in the definition of the "Arizona-Las Vegas

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[14]See 7 U.S.C. § 7253 note.

marketing area"[15] and contains the producer-settlement fund provisions which Petitioners and Dairy Institute of California now challenge.[16]

Fourth, Petitioners and Dairy Institute of California contend the ALJ erroneously rejected their equal protection claim. Petitioners and Dairy Institute of California assert the Secretary of Agriculture's refusal to grant Petitioners the same exemption as mandated by Congress for Anderson Dairy violates the equal protection provisions of the Fifth Amendment to the Constitution of the United States (Petitioners' and Dairy Institute of California's Appeal Pet. at 6, 21-24).

Equal protection "ensures that all similarly situated persons are treated similarly under the law."[17] However, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[18] A regulatory classification "is accorded a strong presumption of

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[15]See 7 C.F.R. § 1131.2.

[16]See 7 C.F.R. §§ 1131.70-.71.

[17]*Vermont Assembly of Home Health Agencies, Inc. v. Shalala,* 18 F. Supp.2d 355, 363 (D. Vt. 1998).

[18]*FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993).

validity" with the burden being "on the one attacking the legislative arrangement to negative every conceivable basis which might support it."[19]

Petitioner has not met this burden. The Secretary of Agriculture applies the regulatory scheme embodied in the Arizona-Las Vegas Milk Marketing Order uniformly, without exception beyond one congressionally-mandated exception for Anderson Dairy. The Arizona-Las Vegas Milk Marketing Order provides no exemption for handlers, such as Petitioners, who ship milk into Clark County, Nevada, or any other part of the area covered by the Arizona-Las Vegas Milk Marketing Order. Moreover, as discussed in this Decision and Order, *supra*, the Consolidated Appropriations Act leaves the Secretary of Agriculture no discretion concerning the imposition of the producer-settlement requirement. The final rule, which the Consolidated Appropriations Act requires the Secretary of Agriculture to implement, includes Clark County, Nevada, in the definition of the "Arizona-Las Vegas marketing area"[20] and contains the producer-settlement fund provisions which Petitioners and Dairy Institute of California now challenge.[21]

Congress provided that the price of milk paid by a handler at a plant operating within Clark County, Nevada, shall not be subject to any marketing order issued under

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[19]*Heller v. Doe,* 509 U.S. 312, 319-20 (1993).

[20]See note 15.

[21]See note 16.

section 8c of the AMAA (7 U.S.C. § 608c).[22] When reviewing a statute under the equal protection clause of the Fifth Amendment to the Constitution of the United States, the test to be applied is whether the statute is rationally related to a legitimate government interest. In making this determination, the court must apply a standard that is extremely deferential to the statutory classifications enacted by Congress.[23] The judge "may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations."[24] The party challenging the legislation "must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[25] "All that is needed for this court to uphold the . . . [classification] scheme is to find that there are 'plausible,' 'arguable,' or 'conceivable' reasons which may have been the basis for the distinction."[26] Moreover, it is "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision."[27] Hence, the statute passes constitutional muster under the equal protection clause, unless Petitioners and Dairy Institute of California prove there is no

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[22]7 U.S.C. § 608c(11)(C).

[23]*City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

[24]*City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976).

[25]*Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

[26]*Brandwein v. California Bd. of Osteopathic Examiners*, 708 F.2d 1466, 1472 (9th Cir. 1983).

[27]*U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980).

plausible reason Congress could have considered for excluding a plant operating in Clark County, Nevada, from the pricing requirements of federal milk marketing orders.

In the instant proceeding, the exemption in section 8c(11)(C) of the AMAA (7 U.S.C. § 608c(11)(C)) passes constitutional muster. Under the federal order reform package from the fall of 1999, the Class I federal milk marketing order price applicable to Clark County, Nevada, would rise significantly. Yet, the Secretary of Agriculture, at all times, chose to keep Clark County, Nevada, and any plants operating in Clark County, Nevada, in the new Arizona-Las Vegas Milk Marketing Order, regardless of whether the 1B milk pricing or the 1A milk pricing structure was adopted.

The House, Senate, and Conference Reports are silent as to the rationale for the exemption for Anderson Dairy, the only fluid milk processor in Clark County, Nevada (Tr. 133). Petitioners and Dairy Institute of California agree that Anderson Dairy procures its milk in Nevada and there is more milk available in Nevada than Anderson Dairy needs to supply to the Clark County, Nevada, market (Tr. 60-61). Since the ultimate purpose of federal milk marketing orders is the orderly marketing of milk to assure an adequate supply of fluid milk to market (7 U.S.C. § 602(4); Tr. 122), Congress might well have determined that no price increase was necessary for the plant operating in Clark County, Nevada, in order to continue to assure an adequate supply of fluid milk to Clark County, Nevada. Therefore, the exemption would be a rational solution clearly adequate to meet the applicable equal protection test. Hence, the exemption in section

8c(11)(C) of the AMAA (7 U.S.C. § 608c(11)(C)) does not violate the equal protection clause of the Fifth Amendment to the Constitution of the United States.

Fifth, Petitioners and Dairy Institute of California contend the ALJ erroneously denied standing to Dairy Institute of California (Petitioners' and Dairy Institute of California's Appeal Pet. at 6, 24-25).

The ALJ concluded, since Dairy Institute of California is not a handler, it cannot obtain relief under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). Consequently, the ALJ realigned the parties to separate Dairy Institute of California from the four Petitioners to which relief could be granted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). (Initial Decision and Order at 2; Order Amending Case Caption.)

I agree with the ALJ. Dairy Institute of California is not a handler; it is a trade association representing dairy processors in California, including Petitioners (Tr. 6). Section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) states *any handler subject to an order* may file a petition with the Secretary of Agriculture for modification of, or exemption from, the order. Moreover, section 900.52(a) of the Rules of Practice (7 C.F.R. § 900.52(a)) states *any handler* desiring to complain that a marketing order is not in accordance with law may file a petition. Section 900.51(i) of the Rules of Practice (7 C.F.R. § 900.51(i)) defines the term *handler*, as follows:

§ 900.51 Definitions.

. . . .

> (i) The term *handler* means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable[.]

7 C.F.R. § 900.51(i).

Neither the AMAA nor the Rules of Practice defines the term *subject to* or identifies the persons who are subject to an order and may therefore file a petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). The term *subject to* has no well-defined meaning and the meaning of the term must be determined from the context in which it is used.[28] Courts have found the common and ordinary meaning of the term *subject to* in various contexts includes "bound by"; "controlled by"; "governed or affected by"; "obligated in law"; "placed under the authority of"; "regulated by"; and "under the control, power, or dominion of."[29]

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[28] *White v. Hopkins*, 51 F.2d 159, 163 (5th Cir. 1931); *United States v. North Pacific Ry. Co.*, 54 F. Supp. 843, 844 (D. Minn. 1944); *Del Rio Land, Inc. v. Haumont*, 514 P.2d 1003, 1005 (Az. 1973); *Bulger v. McCourt*, 138 N.W.2d 18, 22 (Neb. 1965).

[29] *Shell Oil Co. v. Manley Oil*, 124 F.2d 714, 716 (7th Cir.) (in a deed made "subject to" coal rights, the term "subject to" was used in its ordinary sense, i.e., "subordinate to, servient to, or limited by"), *cert. denied*, 316 U.S. 690 (1942); *Texaco v. Pigott*, 235 F. Supp. 458, 463 (S.D. Miss. 1964) (in a deed which states that the purchaser takes property "subject to" the oil and gas lease thereon, the words "subject to" mean "subservient to" or "limited by"); *In re Estate of Kraft*, 186 N.W.2d 628, 631-32 (Iowa 1971) (in a will that states "subject to the foregoing," the term "subject to" means "subordinate to"); *State v. Willburn*, 426 P.2d 626, 630 (Haw. 1967) (when construing the term "subject to" in a statute, it is well established that the term "subject to" may mean "limited by," "subordinate to," or "regulated by"); *Bulger v. McCourt*, 138 N.W.2d 18, 22 (Neb. 1965) (the term "subject to" is an expression of qualification and generally means "subordinate to, subservient to, or affected by"); *Turner v. Kansas City*, 191 S.W.2d 612, 615 (Mo. 1946) (the term "subject to state constitution and laws" means

(continued...)

Dairy Institute of California is not bound by, controlled by, governed or affected by, obligated by, placed under the authority of, regulated by, or under the control, power, or dominion of the Arizona-Las Vegas Milk Marketing Order. Further, the record does not establish that Dairy Institute of California is a person to whom the Arizona-Las Vegas Milk Marketing Order is sought to be made applicable. Therefore, Dairy Institute of California is not a handler under the Arizona-Las Vegas Milk Marketing Order and does

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[29](...continued)
"placed under authority and dominion of such constitution and laws"); *Homan v. Employers Reinsurance Corp.*, 136 S.W.2d 289, 298 (Mo. 1940) (in a reinsurance contract, the term "subject to" all general and special terms and conditions of policies and endorsements means "bound, obligated, or controlled by"); *State v. Tilley*, 288 N.W. 521, 523 (Neb. 1939) (the term "subject to" in a law authorizing sums to be expended by the Attorney General "subject to" the approval of the state engineer, the term "subject to" means "dependent upon; limited by; and under the control, power, or dominion of"); *Van Duyn v. H.S. Chase & Co.*, 128 N.W. 300, 301 (Iowa 1910) (the term "subject to" in a deed means "under the control, power, or dominion of; subordinate to"); *Eslinger v. Pratt*, 46 P. 763, 766 (Utah 1896) (in a statute which reads "the chiefs shall have power, under such rules as the board may establish," the word "under" means "subject to"); *Lydig Construction, Inc. v. Rainier National Bank*, 697 P.2d 1019, 1022 (Ct. App. Wash. 1985) (the words "subject to"ordinarily denote "subordinate to, subservient to, or limited by"); *State Revenue Comm'n v. Columbus Bank & Trust Co.*, 178 S.E. 463, 464 (Ct. App. Ga. 1935) (the term "subject to" has been variously defined by courts and lexicographers as "made liable, subordinate, subservient, subject to the evils of, regulated by, brought under the control or action of, limited by, or affected by"); *Sanitary Appliance Co. v. French*, 58 S.W.2d 159, 163 (Ct. Civ. App. Tx. 1933) (where a contract between principal and an agent prohibited the agent from selling competitor's product and the contract between the agent and subagent was "subject to" the terms of the contract between the principal and agent, the term "subject to" means "bound by").

not have standing to file a petition under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).[30]

Respondent's Appeal Petition

Respondent raises one issue in his appeal petition. Respondent contends the ALJ erroneously concluded the Secretary of Agriculture has authority to grant the relief requested by Petitioners (Respondent's Appeal Pet. at 12).

The ALJ concluded the Secretary of Agriculture could grant the relief requested by Petitioners, as follows:

Conclusions of Law

> . . . .
> 2. The Secretary of Agriculture has the authority to grant the relief requested by the Four Petitioners, despite Congress having enacted into positive law those portions of the federal order reform applicable to the Four Petitioners' claims. 7 U.S.C. § 608c(15)(A).

Initial Decision and Order at 13.

Section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) requires the Secretary of Agriculture to rule on petitions filed by handlers for exemption from or modification of an order. The Secretary of Agriculture may only grant relief requested by a handler when she finds that the order or any provision of the order or any obligation imposed in connection with the order is not in accordance with law.

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[30] *In re Kent Cheese Co., Inc.*, 43 Agric. Dec. 34, 36-37 (1984); *In re M&R Tomato Distributors, Inc.*, 41 Agric. Dec. 33 (1982); *In re Sequoia Orange Co.*, 40 Agric. Dec. 1908 (1981). See generally, *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984); *Pescosolido v. Block*, 765 F.2d 827 (9th Cir. 1985).

In the instant proceeding, Congress exempted Anderson Dairy from the pricing provisions of federal milk marketing orders.[31] Further, effective November 29, 1999, Congress enacted the Consolidated Appropriations Act[32] requiring the final milk marketing order rule, as published in the Federal Register (with exceptions not relevant to this proceeding), to become effective and to be implemented by the Secretary of Agriculture beginning January 1, 2000.

The Consolidated Appropriations Act leaves the Secretary of Agriculture no discretion concerning the imposition of the producer-settlement requirement. The final rule includes Clark County, Nevada, in the definition of the "Arizona-Las Vegas marketing area"[33] and contains the producer-settlement fund provisions which Petitioners and Dairy Institute of California now challenge.[34] Therefore, the Secretary of Agriculture cannot lawfully grant the relief requested by Petitioners and Dairy Institute of California, and I omit from this Decision and Order the ALJ's conclusion of law that indicates otherwise.

Petitioners' and Dairy Institute of California's Request That the Judicial Officer Take Official Notice of April 19, 2002, Hearing Transcript

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[31]7 U.S.C. § 608c(11)(C).

[32]7 U.S.C. § 7253 note.

[33]See note 15.

[34]See note 16.

On March 27, 2003, Petitioners and Dairy Institute of California requested that I take official notice of the transcript of an April 19, 2002, hearing in a rulemaking proceeding involving proposed amendments to the Pacific Northwest Marketing Area (7 C.F.R. pt. 1124) and the Western Marketing Area (7 C.F.R. pt 1135) (Petitioners' Brief in Opposition to Respondents' Cross-Appeal at 6 n.5). Respondent did not file any response to Petitioners' and Dairy Institute of California's request. Therefore, pursuant to section 900.60(d)(7) of the Rules of Practice (7 C.F.R. § 900.60(d)(7)), I take official notice of the transcript of the April 19, 2002, hearing in a rulemaking proceeding involving proposed amendments to the Pacific Northwest Marketing Area (7 C.F.R. pt. 1124) and the Western Marketing Area (7 C.F.R. pt. 1135).

For the foregoing reasons, the following Order should be issued.

ORDER

1. Petitioners' and Dairy Institute of California's Petition is denied.

2. This Order shall become effective on the day after service of this Order on Petitioners and Dairy Institute of California.

RIGHT TO JUDICIAL REVIEW

Petitioners and Dairy Institute of California have the right to obtain review of this Order in any district court of the United States in which Petitioners and Dairy Institute of California are inhabitants or have their principal places of business. A bill in equity for the purpose of review of this Order must be filed within 20 days from the date of entry of this Order. Service of process in any such proceeding may be had upon the Secretary of

Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture. 7 U.S.C. § 608c(15)(B). The date of entry of this Order is September 20, 2004.

Done at Washington, DC

September 20, 2004

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William G. Jenson
Judicial Officer